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# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

### FOURTH APPELLATE DISTRICT

## **DIVISION TWO**

STEPHANIE BLYTHE,

Plaintiff and Respondent,

v.

ALEXANDER COHN, as Arbitrator, Defendant;

COUNTY OF RIVERSIDE,
Real Party in Interest and Appellant.

COUNTY OF RIVERSIDE,
Plaintiff and Appellant,

v.

ALEXANDER COHN, as Arbitrator, Defendant;

STEPHANIE BLYTHE,
Real Party in Interest and
Respondent.

E046711

(Super.Ct.No. RIC412022 & RIC413298)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger,

Judge. Reversed with directions.

Liebert Cassidy Whitmore, Geoffrey S. Sheldon and Laura J. Kalty for Appellant and Real Party in Interest.

Reid & Hellyer, Andrew I. Roth; William J. Kopeny & Associates and William J. Kopeny for Respondent and Real Party in Interest.

## I. INTRODUCTION

Plaintiff Stephanie Blythe was terminated from her civil service employment with the County of Riverside (the County) in May 2001, but an arbitrator determined she had been unlawfully terminated and later ordered her reinstated. Following a series of writ proceedings, the County reinstated Blythe in February 2007. Blythe was unemployed from and after her May 2001 termination and never returned to work for the County. She retired from the County in March 2007, after using accrued vacation time and sick leave.

The County paid Blythe for only six months in back wages, claiming she failed to mitigate the damages stemming from her wrongful termination because, with reasonable diligence, she could have obtained comparable employment no later than six months after her May 2001 termination. Pursuant to supplemental writ proceedings, the trial court conducted a two-day evidentiary hearing on whether Blythe had mitigated her damages. Following the hearing, the trial court found that "the County has not met its burden of showing that [Blythe] did not make reasonable efforts to mitigate her damages by seeking and taking a comparable employment position." The court entered judgment in favor of Blythe for the principal sum of \$293,980.99, representing additional back pay, back benefits, and interest she was owed through February 2007.

The County appeals. First, the County claims that insufficient evidence supports the trial court's determination that the County failed to meet its burden of demonstrating that comparable employment was available to Blythe. We agree with this claim. The evidence the County presented concerning the types of jobs that were available to Blythe—their duties, pay, and benefits—was undisputed, and at least some of these jobs were comparable to Blythe's former supervisorial position with the County as a matter of law. It is therefore unnecessary for this court to consider the County's alternative claims.<sup>1</sup>

In its statement of decision, the trial court indicated that Blythe's "lack of even minimal documentation of her job efforts [was] disconcerting," and that, if adequately motivated, Blythe could have found "any' job" in her field. The court did not, however, expressly determine whether Blythe, given the comparable employment opportunities that were available to her, undertook or failed to undertake reasonable efforts to obtain such employment. Accordingly, the judgment must be reversed and the matter remanded

As an alternative to its insufficient evidence claim, the County urges this court to adopt a rule shifting the burden of proof to Blythe. Specifically, the County argues that once it showed, and the trial court found, that Blythe failed to make reasonable efforts to obtain comparable employment, then either (1) the County should have been relieved of its additional burden of demonstrating that comparable employment was available to Blythe, or (2) the burden should have shifted to Blythe to show that no comparable employment was available to her. The County requests that the matter be remanded to the trial court to reconsider its determinations in light of this standard. Third and finally, the County claims that the \$293,980.99 in additional damages awarded to Blythe constitutes an unconstitutional gift of public funds. (Cal. Const., art XVI, § 6.) As indicated, however, it is unnecessary for this court to consider these claims in light of our conclusion that the County presented sufficient evidence that comparable employment was available to Blythe.

to the trial court with directions to determine whether the County met its burden of showing that Blythe failed to undertake reasonable efforts to obtain comparable employment.

## II. FACTS AND PROCEDURAL HISTORY

Blythe worked for the County for 23 years, from 1978 through May 2001, and was eventually promoted to a Revenue and Recovery Supervisor II for the Riverside County Regional Medical Center (RCRMC). Her duties consisted of bill collecting and supervising other bill collectors in the patient accounts department at RCRMC. In September 2000, one of Blythe's subordinates filed a complaint alleging that Blythe and other supervisors had created a hostile work environment based on race, among other factors.

The County's human resources department investigated the complaint and determined that Blythe had created a hostile work environment by systematically degrading subordinates, calling them names such as "fat boy" and "slut." The hostile work environment Blythe created was also marked by favoritism, intimidation, disparate treatment, abusive behavior, and oppression. The investigator further concluded that Blythe had negligently and inefficiently performed her duties. She failed to oversee employees, resolve problems, or improve bill collections.

In May 2001, Blythe was terminated for these reasons and for "dishonesty" for lying to the investigator during the investigation. Blythe appealed her termination pursuant to the collective bargaining agreement, or memorandum of understanding

(MOU), between her union and the County, and the matter was submitted to arbitration.

The 11-day arbitration commenced in April 2002 and concluded in February 2003.

The arbitrator, Alexander Cohn, issued his original decision in February 2004 and a supplemental decision in March 2004. Cohn sustained virtually all of the charges against Blythe, including the charges of "dishonesty, incompetence, inefficiency/negligence, neglect of duty, insubordination and discourteous treatment of other employees." He found "ample evidence that [Blythe] had been discourteous to employees and had created a hostile work environment, and that her unprofessional conduct adversely affected the operations of her department." He also found that, "[w]ithout question, [Blythe] showed favoritism toward certain employees."

Despite these findings, Cohn reduced the County's termination penalty to a 90-day unpaid suspension and ordered Blythe demoted from her supervisorial position to Revenue and Recovery Technician II (a bill collector). He reasoned that, "[o]n balance, given [Blythe's] 23 discipline-free years, and satisfactory or better performance evaluations over her tenure, . . . the County . . . must bear some responsibility for [Blythe's] overall situation . . . ." (Fn. omitted.) Cohn found that Blythe's dishonesty during the investigation was partly based on her perception of events, and "keeping in mind [Blythe was] not a 'sworn peace officer,'" did not amount to "gross misconduct warranting summary discharge." In ordering the demotion, however, Cohn wrote that, "[w]ithout question, notwithstanding [Blythe's] length of service and prior record, the record presented demonstrates [Blythe] cannot remain a supervisor."

In May 2004, Blythe appealed Cohn's decision by petitioning the superior court for writs of administrative mandamus. She alleged Cohn's factual findings were not supported by the weight of the evidence, the County violated her due process rights, and, pursuant to the terms of the MOU, Cohn was without jurisdiction to demote her. The County filed a cross-petition, challenging Cohn's decision to reduce the penalty from termination to a suspension and demotion. The writ petitions were consolidated and heard together.

In July 2005, the trial court (Hon. Dallas Holmes) issued a decision rejecting all of Blythe's arguments except one. The court found that the MOU did not afford the arbitrator jurisdiction to order a demotion, and remanded the matter to the arbitrator with directions to reconsider the "appropriate discipline or penalty for the misconduct" in question. The court said the arbitrator "may have to reconcile his determination that Ms. Blythe's length of service and prior record tipped the balance against termination with his determination that, notwithstanding [her] length of service or prior record, she cannot remain a supervisor." The County's petition was rendered moot. Following remand, Cohn rejected the County's request to reinstate the termination penalty, and imposed only the 90-day suspension, without the demotion. He ordered Blythe reinstated to her former supervisorial position, with back pay and benefits, less "outside earnings," including unemployment insurance benefits, during the period of her termination.

In November 2005, the County filed a supplemental writ petition, alleging that

Cohn abused his discretion in refusing to reinstate the termination penalty, in view of his

finding that Blythe "cannot remain a supervisor." In November 2006, the trial court (Hon. Dallas Holmes) denied the County's supplemental petition, finding the arbitrator did not abuse his discretion in refusing to find that Blythe's conduct warranted her termination.

On February 5, 2007, the County reinstated Blythe to her former supervisorial position, but Blythe did not return to work. She retired around March 14, 2007, after utilizing all of her accrued sick leave and vacation time and requesting family medical leave. Earlier, in December 2004, Blythe and her husband moved from California to Louisiana following her husband's retirement.

In October 2007, Blythe filed a supplemental writ petition alleging that the County failed to pay her all the back pay and benefits she was due. The County paid Blythe for six months of back wages and benefits totaling \$12,800.91, and reinstated her accrued vacation, sick leave, and similar benefits, but did not pay her for the entire May 2001 to February 2007 period of her termination. The County relied on the expert opinion of Jeannette S. Clark, a vocational counselor, who opined that Blythe should have obtained comparable employment between 60 days to six months following her May 2001 termination, had she made reasonable efforts to find comparable employment.

On March 28 and April 25, 2008, the trial court (Hon. Gary B. Tranbarger, following Judge Holmes's retirement) conducted an evidentiary hearing to determine whether Blythe made reasonable efforts to mitigate her damages by seeking comparable employment. Blythe testified concerning her attempts to find comparable employment.

She did not submit any documentation of her job search efforts and called no witnesses on her behalf. She claimed she sent applications or resumes to 22 employers in the Riverside County area, between June 2001 and December 2004. She had two interviews, one with the Riverside County Credit Union and another with Money Control, a collection agency, but she received no job offers.

In December 2004, Blythe and her husband moved to Louisiana for financial reasons. Her husband had to retire as a deputy sheriff after he suffered a detached retina, they no longer had her employment income, and the cost of living was lower in Louisiana. They had also refinanced their home shortly after Blythe was terminated and had already drawn on Blythe's retirement savings. Following her move to Louisiana in December 2004 through February 2007, Blythe applied for employment at three local hospitals, but received no responses from any of them. She never sought job counseling, vocational services, and never contacted a recruiter or temporary placement agency, either locally or in Louisiana.

Blythe admitted she did not actively seek employment between mid-2004 and January 2005. During that time, she was providing full-time care to her terminally ill mother and was also caring for her husband after he suffered a detached retina. She would have gone back to work when the arbitrator ordered her reinstated in February 2004, and when the court ordered her reinstated thereafter.

Ms. Clark, the County's vocational expert, testified that, in her opinion, Blythe should have been able to obtain comparable employment no more than six months

following her May 2001 termination had she made reasonable efforts to obtain employment. Ms. Clark explained that Blythe's employment prospects were favorable because she had a long-standing, 23-year work history, was intelligent, well-groomed, and in her early 50's, which in Ms. Clark's experience was "a fantastic age for finding employment."

In addition, Ms. Clark identified several current job openings which the County claimed were comparable to Blythe's former supervisorial position. Two positions were in medical billing and collections at AppleOne in Yucaipa. One was a supervisory position paying \$52,000 per year; the other paid between \$45,000 and \$55,000 per year and required "the same . . . skill sets." Loma Linda University Medical Center also had a current opening in medical billings, collection, and safeguarding patient data. This position paid between \$60,000 and \$93,000 per year. Ms. Clark testified that similar openings would have been available in 2001, according to job statistics tracked by the California Employment Development Department (EDD) through its system known as California Occupational Information Systems (COIS). Ms. Clark also identified comparable employment positions in Lafayette, Louisiana, 20 miles from Opelousas, Louisiana, where Blythe moved with her husband in December 2004. LHC Group, LLC, a health facility, was seeking a billing and accounts receivable manager and a division collector, who would be "responsible for the overall collection of patient account receivables through follow-up with Medicare, insurance companies, patients or financial guarantors."

In Ms. Clark's opinion, there was no evidence that Blythe had undertaken reasonable efforts to obtain comparable employment. In her experience, people seeking employment have detailed records of their search, including rejection letters, notes, and "boxes, reams of information," but Blythe had no documentation of her employment search, not even a resume. Ms. Clark further testified that a person seeking employment should place their resume online, make at least 25 employer contacts per week, and follow-up with each contact within 24 hours. It is also advisable to consult with employment counselors and recruiters, attend job fairs and professional seminars, and apply to temporary agencies. Ms. Clark found no evidence that Blythe did any of these things.

Following the hearing, the trial court found in favor of Blythe and awarded her \$293,980.99 in back pay, benefits, and interest, for the balance of the May 2001 to February 2007 time period her termination was in effect. In its statement of decision, the court explained its ruling:

"With the exception of 5 months (20 weeks) from mid-2004 to January 2005, the court finds that the County has not met its burden of showing that [Blythe] did not make reasonable efforts to mitigate her damages by seeking and taking a comparable employment position.

"The Court agrees with the County that had [Blythe] been adequately motivated to find 'any' job in her field of experience, she could have found one. However, the jobs the County asserts [Blythe] should have taken are not comparable to the job she lost.

[Blythe] was terminated from a supervisor's position after 23 years of experience. The jobs the County asserts she could have found would have been entry-level positions with lesser levels of responsibility and lesser levels of pay. Contrary to the opinion of the County's expert, the Court finds [Blythe] was not a particularly attractive job candidate to potential employers. At some point before actually getting hired, [Blythe] would be obligated to inform a future employer that she was terminated from a civil service position for dishonesty. It is most likely that such information would disqualify [Blythe] from any but the lowest level jobs.

"It is true that [Blythe's] lack of even minimal documentation of her job efforts is disconcerting, however this fact, alone, is not enough for the County to carry their burden."

The court entered judgment in favor of Blythe, and the County timely appealed.

#### III. DISCUSSION

The County claims that insufficient evidence supports the trial court's finding that the County failed to meet its burden of showing that *comparable employment* was available to Blythe between 2001 and 2007. We agree.

In California, a wrongfully discharged employee has a duty to mitigate his or her damages by seeking and retaining *comparable or substantially similar* employment while pursuing remedies against the employer. (*Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 255; *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1500-1501.) The employee's duty to mitigate does not include a duty

to seek employment of "a different or inferior kind," however. (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 182 (*Parker*).) The employer has the burden of showing the employee failed to mitigate his or her damages, that is, "what the employee has earned or with reasonable diligence might have earned from other employment." (*Martin v. Santa Clara Unified School Dist., supra*, at p. 255; citing *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 249 (*California School Employees Assn.*).)

The *Parker* court summarized these rules as follows: "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. [Citations.] However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was *comparable*, *or substantially similar*, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker*, *supra*, 3 Cal.3d at pp. 181-182, italics added.)

Thus, an employer seeking to offset an employee's wrongful termination damages has a dual burden. The employer must first show that comparable employment was available to the employee. Then the employer must *also* show that the employee failed to

undertake reasonable efforts to obtain comparable employment that was available to him or her. (See *Martin v. Santa Clara Unified School District, supra*, 102 Cal.App.4th at p. 255, and cases cited.)

Our standard of review is well settled. In considering a claim that insufficient evidence supports a judgment, we review the entire record in the light most favorable to the judgment in order to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that the trier of fact could have reasonably determined that each element of the judgment was established according to the applicable burden of proof. (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412-414.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.)

The first question presented on this appeal is whether substantial evidence supports the trial court's determination that all of the jobs the County claimed were available to Blythe were *inferior* rather than comparable or substantially similar to Blythe's former supervisorial position. As noted, the trial court expressly found that all of the jobs the County proffered were "entry-level positions with lesser levels of responsibility and lesser levels of pay." For the reasons we explain, we conclude that insufficient evidence supports this conclusion.

"[T]he issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California." (*California School Employees* 

Assn., supra, 30 Cal.App.3d at pp. 253-254, citing Parker, supra, 3 Cal.3d at p. 184 [actress Shirley MacLaine not required to accept Western movie role which court considered inferior, as a matter of law, to musical comedy role she had contracted to perform]; see also Gonzales v. Internat. Assn. of Machinists (1963) 213 Cal.App.2d 817, 822-823 [union machinist not required to accept nonunion work the court deemed inferior to his former position as matter of law].) On the other hand, the issue whether available employment is comparable or inferior to an employee's former employment may involve questions of fact. (See Parker, supra, at p. 184 (dis. opn. of Sullivan, J.).)

Here, the *nature* of the employment opportunities the County claimed were available to Blythe, namely, their duties, pay levels, benefits, and locations, was not in dispute, and it is clear from the trial court's statement of decision that it credited Ms. Clark's testimony in these respects. The only question for the trial court was whether any of the job opportunities the County showed were available to Blythe were comparable or inferior to her former supervisorial position with the County. This was a question of law, which we review de novo. When, as here, there is no conflict in the relevant evidence, the question whether the evidence is sufficient to support the judgment, or a particular finding essential to the judgment, is a question of law. (*California School Employees Assn., supra, 30 Cal.App.3d at p. 254.*)

The facts of *California School Employees Assn.* are illustrative. There the appellate court agreed with the trial court's conclusion that comparable employment was available to a wrongfully terminated school bus driver during the period of her

termination, as a matter of law. (California School Employees Assn., supra, 30 Cal.App.3d at pp. 245, 254.) The appellate court treated the question of comparability as one of law, because the relevant evidence was undisputed. Specifically, the evidence showed that numerous other positions for school bus drivers, in the same location where the employee had previously worked, were available during the period of the employee's termination. The open positions offered less pay and fewer benefits than the employee's former position, but the appellate court considered these differences slight and therefore insufficient to render the open positions inferior to the employee's former position as a matter of law. (*Id.* at pp. 250-254.) The appellate court explained: "There will perforce be some differences between any two jobs. However, as Sullivan, J. pointed out in his dissenting opinion in [Parker, supra, 3 Cal.3d at page 186], 'It has never been the law that the mere existence of differences between two jobs in the same field is sufficient, as a matter of law, to excuse an employee wrongfully discharged from one from accepting the other in order to mitigate damages." (*Id.* at p. 254.)

Here, as in *California School Employees Assn.*, the differences between at least some of the jobs the County's vocational expert Ms. Clark identified as being available to Blythe and Blythe's former position with the County were insignificant as a matter of law. At the time of her termination in May 2001, Blythe was a supervisor in the patient accounts department at RCRMC. Her duties included bill collecting and supervising other bill collectors. Had Blythe still been employed in her former supervisorial position in February 2007, she would have been earning \$26.50 per hour or approximately

\$55,000 per year. Ms. Clark identified several substantially similar positions that were open at or shortly before the time of the hearing. These included two medical billings positions at AppleOne in Yucaipa. One was a supervisory position paying \$52,000 per year; the other required the "same . . . skill sets" and paid in the range of \$45,000 to \$55,000 per year. Loma Linda University Medical Center was also seeking a person with experience in medical billing and collection, and safeguarding patient data, with a salary range of \$60,000 to \$93,000. A similar position had been filled in 2006. In addition, a multiphysician facility, Office Works, Inc., located in Riverside, was seeking full-time personnel experienced in medical collections and billing. Ms. Clark testified that similar positions would have been open at the time of Blythe's termination in 2001, according to job statistics tracked by the EDD through its COIS system.

As noted, the trial court credited Ms. Clark's testimony concerning the nature of the jobs that were available to Blythe during the period of her termination. It also indicated that, "had [Blythe] been adequately motivated to find 'any' job in her field of experience, she could have found one." Still, the court found Ms. Clark's testimony insufficient to meet the County's burden of showing that comparable employment was available to Blythe, because all of the positions Ms. Clark identified were "entry-level positions with lesser levels of responsibility and lesser levels of pay."

First, the record does not support this conclusion. As indicated, one of the open positions at AppleOne in Yucaipa was a supervisorial position and paid \$52,000 per year, only slightly less than the \$55,000 per year Blythe would have been making in her former

supervisorial position in 2007. In addition, the position at Loma Linda University Medical Center required experience and paid substantially more (\$60,000 to \$93,000 per year) than Blythe would have been earning in her former position with the County (\$55,000 per year).

Moreover, the trial court interpreted the doctrine of comparability too narrowly or restrictively as a matter of law. Insignificant differences in pay, benefits, and responsibilities must be disregarded in favor of a standard of commercial reasonableness. As Justice Sullivan explained in his dissenting opinion in *Parker*: "The familiar rule requiring a plaintiff in a tort or contract action to mitigate damages embodies notions of fairness and socially responsible behavior which are fundamental to our jurisprudence. Most broadly stated, it precludes the recovery of damages which, through the exercise of due diligence, could have been avoided. Thus, in essence, it is a rule requiring reasonable conduct in commercial affairs. This general principle governs the obligations of an employee after his employer has wrongfully repudiated or terminated the employment contract. Rather than permitting the employee simply to remain idle during the balance of the contract period, the law requires him to make a reasonable effort to secure other employment. He is not obligated, however, to seek or accept any and all types of work which may be available. Only work which is in the same field and which is of the same quality need be accepted." (Parker, supra, 3 Cal.3d at p. 185 (dis. opn. of Sullivan, J.), fns. omitted, italics added; see also California School Employees Assn., *supra*, 30 Cal.3d at p. 249.)

In sum, the County showed that work in the same field and of substantially the same quality, in terms of pay and responsibilities, was available to Blythe during the period of her termination, and it is evident from the trial court's statement of decision that it credited this evidence. The trial court's determination that all of the County's proffered job opportunities were inferior to Blythe's former supervisorial position was therefore in error. As a matter of law, the County proved that comparable employment was available to Blythe.

Still, the trial court pointedly did not determine whether Blythe undertook or failed to undertake reasonable efforts to obtain comparable employment, the second of the two issues presented for its determination. Although the court indicated Blythe could have found "any" job in her field had she been "adequately motivated," and further indicated that her "lack of even minimal documentation of her job efforts [was] disconcerting," the court did not determine whether the job search efforts Blythe undertook were reasonable, either before or after she moved to Louisiana in December 2004. For this reason, the matter must be remanded to the trial court with directions to make this determination.

For guidance on remand, we observe that whether Blythe's wrongful termination for "dishonesty" effectively disqualified her from obtaining *any* comparable employment, as the trial court found, is relevant to whether Blythe undertook reasonable efforts to find comparable employment. The trial court expressly indicated that Blythe was "not a particularly attractive job candidate" because she had been terminated from a civil service position for dishonesty, and the dishonesty charge "most likely" disqualified her "from

any but the lowest level jobs." The court thus indicated that, even if Blythe had undertaken reasonable efforts to obtain comparable employment, her efforts would have been futile in view of the County's wrongful termination of her for dishonesty.

Alternatively, the court may have been indicating that Blythe *was excused* from undertaking reasonable efforts to obtain comparable employment because her wrongful termination for dishonesty "most likely" would have rendered any such efforts futile. In any event, the evidence in the present record does not support either of these conclusions.

"[T]he employee's actual damage is the amount of money he [or she] was out of pocket by reason of the wrongful discharge.' [Citation.]" (*Stanchfield v. Hamer Toyota*, *supra*, 37 Cal.App.4th at p. 1502.) The court was free to reject Ms. Clark's testimony that Blythe was an attractive job candidate due to her age, experience, and other personal attributes. It was also free to reject Ms. Clark's further testimony that Blythe could have "softened" the reasons for her termination, including the dishonesty charge, by waiting to disclose them to an employer during a face-to-face interview. But even if the court rejected these portions of Ms. Clark's testimony, there is no evidence in the present record that Blythe's dishonesty during the investigation *either did in fact or most likely would have* disqualified her from obtaining comparable employment.

Indeed, Blythe did not present any evidence that she was in fact or probably would have been rejected for comparable employment based on the dishonesty charge. For example, she did not testify that any of her employment applications were in fact rejected due to the dishonesty charge, nor did she present any expert testimony that, in her field of

work, the dishonesty charge would have most likely disqualified her from obtaining comparable employment. Thus, the trial court's conclusion, on the present record, that the dishonesty charge "most likely" undermined Blythe's comparable employment prospects was based solely on conjecture. (See *Martin v. Santa Clara Unified School Dist.*, *supra*, 102 Cal.App.4th at pp. 256-257 [discharged employee's assumption that she was unemployable due to the reasons for her termination was insufficient to show that her efforts to seek comparable employment would have been futile].)<sup>2</sup>

#### IV. DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings consistent with the views expressed in this opinion. The parties shall bear their respective costs on appeal.

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We concur:  /s/ McKinster  Acting P.J.	We concur:
/s/ McKinster Acting P.J.	WC College.
Acting P.J.	
/s/ Miller	
	/s/ Miller

<sup>&</sup>lt;sup>2</sup> Blythe's request for sanctions and/or attorney fees, filed on May 11, 2009, on the ground the County's appeal is frivolous, is denied. For the reasons explained, the County's appeal is meritorious. The County's request for judicial notice of certain records in the "related case" of *Patricia Hinojos v. Michael Prihar (County of Riverside)*, Riverside County Superior Court case No. RIC416900, which the County proffered in opposition to Blythe's request for sanctions and/or attorney fees, is denied as moot.